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December 18, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II, 445 12th Street, S.W., Ste. TW-A325
Washington, D.C. 20554

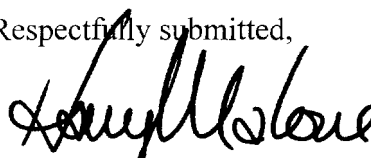
Re: MM Docket No. 01-276; Amendment of the Television Table of Allotments,
Notice of Proposed Rulemaking, FCC 01-286 (rel. Oct. 11, 2001)

Dear Ms. Salas:

Citizens for Independent Public Broadcasting and the Alliance for Progressive Action, by their counsel, and pursuant to § 1.415 and 1.419 of the Commission's rules, are pleased to submit an original and four (4) copies of their Comments in the above-referenced proceeding.

Please date-stamp the extra copy of this filing and return it to us. Any questions or concerns regarding the enclosed comments should be addressed to the undersigned.

Respectfully submitted,



Jeffery M. Karp
Harry N. Malone

Counsel for Citizens for Independent
Public Broadcasting

Enclosure

cc: Jerold M. Starr, CIPB
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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
Deletion of Noncommercial Reservation) MM Docket No. 01-276
of Channel *16, 482-488 MHz,)
Pittsburgh, Pennsylvania.)
)

**COMMENTS OF CITIZENS FOR INDEPENDENT PUBLIC BROADCASTING
AND ALLIANCE FOR PROGRESSIVE ACTION
IN OPPOSITION TO WQED's DERESERVATION PETITION**

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Dated: December 18, 2001

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SUMMARY

The Commission has initiated the instant rulemaking to determine if it is in the public interest to dereserve Channel *16 and if so, whether the dereserved channel should be subject to competing applications. However, before the Commission can determine whether it is in the public interest for WQED to dereserve (and sell) Channel *16, it must first address the threshold question of whether WQED is entitled to any interest at all in Channel *16. For almost two years now, the Commission has had before it a Petition requesting that it reconsider its decision to renew WQED's license to operate Channel *16. As QED is merely using Channel *16 to simulcast its Channel *13 programming, WQED continues to waste Channel *16 and has indicated that it has no intention of stopping. The practical effect of this simulcasting is the same as if the channel had gone dark. The Commission has previously found that the elimination of Channel *16's separate programming is not in the public interest; considering that QED has no intention of operating the channel in accordance with the terms under which it was granted, the Commission should take the next logical step of denying QED's license to operate Channel *16.

Even if QED is allowed continued control of Channel *16, it still should not be permitted to dereserve the channel, because it can not meet the extremely high burden of proof required to do so. Citing this high burden, the Commission previously denied QED's request to dereserve Channel *16 under circumstances much more dire than presented today. Even if this previous denial was not controlling, there is a long line of Commission decisions that explicitly favor preserving reserved channels, even over the short term interests of noncommercial and commercial licensees. The long term preservation of opportunities for noncommercial television has always been a basic tenet of Commission policy. If the Commission were to lose sight of this important value and permit dereservation of Channel *16, it would overturn longstanding precedent and precipitate a landslide of similar applications as other noncommercial broadcasters succumb to market forces that encourage them to "flip" their licenses.

In any event, Channel *16 is a poor case to justify overturning important precedent because QED's ability to serve will not be impaired absent a sale of Channel *16. QED's problems arise not from a fundamental weakness in its market, but instead from repeated attempts to impose a *political* solution on a *business* problem. QED has overstated its financial problems and continues to resist making the many reasonable, and feasible, business decisions that could eliminate its debt.

QED has also demonstrated its estrangement from the viewers by misrepresenting the economic vitality of the Pittsburgh area and underestimating the area's ability to support a second donor-reliant noncommercial station. Contrary to QED's claims, the Pittsburgh economy is healthier than ever and the potential corporate funding base is larger today than in the past. Many other smaller markets are able to sustain two vibrant, donor-reliant stations. If QED is incapable of operating a second noncommercial channel, there are many other entities in the Pittsburgh area willing and able to do so – although they are not willing or able to supply WQED with the windfall that it demands as a condition of loosening its grip on this public trust. More than ever, the Pittsburgh market needs a second noncommercial educational station. Noncommercial broadcast television still represents the most ubiquitous and only cost-free means of receiving the kind of local programming and discourse that bind a community together and serve the interests of the largest cross-section of the public.

If, notwithstanding the many reasons to preserve Channel *16 as a reserved channel, the Commission decides to dereserve it, then it should open the channel to competitive auction, as required by law. In this manner, the Commission will foster competition and ensure that the maximum value of the dereserved channel is realized and returned to the public. Moreover, the proceeds of the auction will accrue to the benefit of the public at large, rather than being handed over to WQED as a "corporate welfare" following its years of mismanagement of the public trust.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
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Deletion of Noncommercial Reservation)	MM Docket No. 01-276
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**COMMENTS OF CITIZENS FOR INDEPENDENT PUBLIC BROADCASTING
AND ALLIANCE FOR PROGRESSIVE ACTION
IN OPPOSITION TO WQED's DERESERVATION PETITION**

The Pittsburgh Citizens for Independent Public Broadcasting - Pittsburgh ("CIPB") and the Alliance for Progressive Action ("APA") (collectively referred to as CIPB/APA), respectfully submit these comments in response to the Commission's *Notice of Proposed Rulemaking* in the above referenced docket ("*Notice*"). CIPB-Pittsburgh is the local division of the national nonprofit organization CIPB. CIPB-Pittsburgh is dedicated to supporting a local service that is universally available, noncommercial, serves the full diversity of the local community, and embodies the founding principles of the Public Broadcasting Act. APA is a coalition of approximately 40 public interest organizations and 200 individuals in the Greater Pittsburgh Area. APA was founded in May 1991 to establish an ongoing network of progressive organizations and individuals to coordinate efforts to respond to issues of common concern such as local public broadcasting. Both CIPB-Pittsburgh (in its initial incarnation as the QED Accountability Project) and the APA have been involved in the previous proceedings concerning WQED's ("QED") various attempts to dereserve or assign WQEX.

I. THE PUBLIC INTEREST WILL BE BEST SERVED IF THE COMMISSION DENIES QED'S RENEWAL APPLICATION FOR WQEX AND ALLOWS OTHER LOCAL NONCOMMERCIAL EDUCATIONAL ENTITIES TO APPLY FOR THE LICENSE TO OPERATE CHANNEL *16 IN THE PUBLIC INTEREST.

As a threshold matter, the most efficient and appropriate action for the Commission to take at this time would be to grant the Petition for Reconsideration of QED's license renewal application for WQEX, which has been pending before the Mass Media Bureau since January 31, 2000, one year longer than WQED's Petition to Dereserve. Grant of the Petition for Reconsideration would obviate the need for the FCC to even consider taking the drastic step of dereservation and would lead to the licensing of the station to another noncommercial educational entity with a genuine interest in serving citizens in the Pittsburgh region.

For over four years, QED has been broadcasting identical programming on both Channels *13 and *16, even though both Channels serve the same populations. When QED announced that it would begin simulcasting programming on channels *13 and *16 in November 1997, it had pending an application for consent to assign Channel *16 to Cornerstone Television, Inc.¹ QED attempted to justify its decision to simulcast as a way to save money until the station would be sold.² In response to the simulcasting announcement, the Alliance for Progressive Action and the QED Accountability Project ("Alliance") filed an Emergency Petition to initiate an early evaluation of QED's fitness as a licensee based on the public interest concerns raised by the decision to simulcast.³ However, the Commission took no action on this petition.

¹ Application of WQED Pittsburgh and Cornerstone Television, Inc. For Consent to the Assignment of License of Noncommercial Educational Station WQEX(TV), Channel *16, Pittsburgh, PA, File No. BALET-970602IA.

² WQED News Release, Sept. 19, 1997.

³ Emergency Petition to Direct Immediate Filing of Renewal Applications Re: WQED and WQEX, at 2 (Oct. 7, 1997).

Then, in April 1999, QED filed its regular renewal applications for both Channel *13 and *16.⁴ The Alliance timely filed a petition to deny QED's renewal applications arguing that QED could not make the public interest showing required by § 309(k)(1)(a) because it had been simulcasting on Channels *13 and *16 for close to two years.⁵ The Alliance argued, *inter alia*, that simulcasting the same programming on both channels was "an obvious waste of a valuable public resource" equivalent to Channel 16 going dark, an event which normally would cause a license to expire automatically after twelve months.⁶

In December 1999, the Commission approved the application to assign Channel *16 to Cornerstone.⁷ At the same time, the Commission dismissed the Alliance's Emergency Petition, "conclud[ing] that *given the circumstances present here*, WQED's decision to simulcast its two television stations *during the pendency* of this proceeding raises no issue *regarding its qualifications to transfer* WQEX(TV)."⁸ A few days later, in a three paragraph ruling, the Mass Media Bureau approved QED's renewal application and rejected the Alliance's arguments as moot in light of the Commission's grant of the proposed assignment of Channel *16 to Cornerstone.⁹ However, the Cornerstone deal fell through a month later.¹⁰

⁴ Application for Renewal of License for Station WQED(TV), Channel *13 Pittsburgh, PA, File No. 99-0401KV; Application for Renewal of License for Station WQEX(TV), Channel *16, Pittsburgh, PA, File No. 99-0401KW ("*Renewal Applications*").

⁵ Petition to Deny, Application for Renewal of License for Station WQED(TV), Channel *13 Pittsburgh, PA, File No. 99-0401KV; Application for Renewal of License for Station WQEX(TV), Channel *16, Pittsburgh, PA, File No. 99-0401KW (June 1, 1999) ("*Petition to Deny*").

⁶ *Id.* at 9.

⁷ WQED Pittsburgh, File No. BALET-970602IA, *Memorandum Opinion and Order*, 15 FCC Rcd 202 (1999), vacated in part, WQED Pittsburgh, File No. BALET-970602IA, *Order on Reconsideration*, 15 FCC Rcd 2534 (2000) (petitions for reconsideration pending).

⁸ *Id.* para. 10 (emphasis added).

⁹ Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Angela Campbell & Barbara K. Gardner (Dec. 30, 1999).

¹⁰ Letter from Richard R. Zaragoza & Kathryn Schmeltzer, to Magalie Salas, Secretary, Federal Communications Commission (Jan. 18, 2000).

Consequently, the Alliance filed a petition for reconsideration of the Bureau's grant of the license renewals arguing that the factual predicate -- that simulcasting on WQEX would no longer continue because the station would be taken over by Cornerstone -- no longer existed.¹¹ Thus, the Alliance argued that the Bureau had to address the question of whether QED's continued simulcasting would serve the public interest.¹²

Not only has QED continued to simulcast, but it makes clear in the new Petition to Dereserve that it has *no intention* of stopping: "[A]bsent a dramatic improvement to its financial situation (and no such improvement is foreseeable), QEX will continue to simulcast indefinitely."¹³ In other words, QED is holding the channel hostage in the attempt to exploit a public trust for profit. QED's continued simulcasting wastes a valuable, scarce public resource and deprives the Pittsburgh community of a much desired alternative source of noncommercial educational programming.¹⁴ The Commission has already found that elimination of WQEX's distinct programming is not in the public interest:

¹¹ Petition for Reconsideration, Application for Renewal of License for Station WQED(TV), Channel *13 Pittsburgh, PA, File No. 99-0401KV; Application for Renewal of License for Station WQEX(TV), Channel *16, Pittsburgh, PA, File No. 99-0401KW at 4 (Jan. 31, 2000) (*"Petition For Reconsideration"*).

¹² *Id.* See also Reply to Opposition, Application (Form 303S) for Renewal of Licenses for Stations WQED(TV) and WQEX(TV), Pittsburgh, PA, File No. 99-0401KV and 99-0401KW, at 2 (Feb. 14, 2000).

¹³ *Petition* at 18-19.

¹⁴ In their letters to the Commission, Pittsburgh citizens expressed anger and disappointment that QED's simulcasting has deprived them of WQEX's alternative programming. Pittsburgh citizen Antje Price commented, "Until it was switched to simulcasting WQED in 1997, I was a regular viewer of WQEX, in fact I watched and enjoyed it more than WQED. Since then I have sorely missed the community oriented and alternative prime time programming that was largely eliminated, or transferred to its sister station at some awkward hour . . . I miss the diversity offered by two public television outlets in this area." See Letter from Antje Price to the Commission (Feb 7, 2001); see also Letter from Robert Clark to Chairman Powell (Feb. 12, 2001)(stating that until WQED began simulcasting, WQEX played "an important role" in the Pittsburgh community by "showing national programs that were not on QED" and featuring "worthwhile programs that focused on matters of local concern").

[W]e cannot conclude that there is no need for a second noncommercial channel at Pittsburgh . . . While WQED asserts that it no longer needs WQEX-TV to provide the service for which it was originally intended, classroom instructional programming, this argument overlooks the fact that WQEX(TV) is presently offering programming 16 hours a day and that this programming cannot be fully replaced simply by extending the hours of operation of WQED. Moreover, Pittsburgh currently has the benefit of two noncommercial educational stations during prime viewing hours, a benefit that would not be maintained by extending WQED's broadcast day.¹⁵

QED's continued simulcasting has caused the loss of sixteen hours of educational programming each day as well as the benefit of having two educational stations during prime time. The effect is the same as if the station had stopped transmitting. QED admits as much in the instant petition, stating that "[t]he practical effect of the loss of WQEX's reserved status . . . will be negligible because WQEX simulcasts programming already available to viewers on WQED."¹⁶ In fact, three cable systems already have removed the WQED simulcast on Channel *16 and substituted other programming in response to viewer complaints. Under 47 C.F.R. § 73.1720(c), a station that has stopped transmitting for twelve consecutive months automatically loses its license. QED should likewise lose its license.

When QED announced its intention to begin simulcasting as of November 7, 1997, QED Executive Director Carolyn Wean indicated that it would save the station between \$300,000 and \$500,000 a year.¹⁷ However, starting July 1, 1999, the Pennsylvania Public Television Network ceased providing its \$425,000 annual grant to WQED for separate programming on WQEX. In a conversation on December 10, 2001, H. Sheldon Parker of PPTN informed CIPB that "we do not fund for simulcasting. It is hard to justify paying for it." Since the amount of money lost may exceed the amount of savings sought, simulcasting on WQEX appears to be aimed at making the public forget about Channel *16 as a programming source so as to reduce the amount of outcry

¹⁵ Deletion of Noncommercial Reservation of Channel *16, *Memorandum Opinion and Order*, 11 FCC Rcd 11700 para. 21 (1996) ("1996 Order").

¹⁶ *Petition* at 8 n.10.

¹⁷ Ron Weiskind, *WQEX to Air WQED Fare*, Pittsburgh Post-Gazette, Sep. 20, 1997 (available at 1997 WL 11847318).

over its sale. Fortunately, that strategy has not worked. Pittsburghers have shown that they are as adamant as ever to restore public broadcasting to Channel *16.¹⁸

Because QED's continued simulcasting disserves the public interest, the Commission should grant the Alliance's Petition for Reconsideration and deny QED's license renewal for WQEX. The effect of this action would be to create a vacant reserved channel for which schools and other noncommercial educational organizations could apply. Without the barrier to entry posed by QED's demand for \$20 million, one or more noncommercial educational entities would be certain to apply.¹⁹ Pittsburgh is home to major university communications and broadcast

¹⁸ For example, John B. Clark writes that "WQEX was a viable, self-supporting PBS station for a period of years. It was very community-interactive and also carried programming - European shows and series - that complemented the standard PBS fare that WQED carried. Pittsburgh can support two PBS stations. WQEX was financially solvent and provided a real and valued contribution to Pittsburgh television viewing." E-mail, Dec. 17, 2001. Glenn A. Walsh, a former member of the board of the Andrew Carnegie Free Library writes: "It is now clear that WQED Pittsburgh no longer intends to use the channel 16 allocation for educational, noncommercial purposes. And, until WQED Pittsburgh no longer holds the license for channel 16, no other major Pittsburgh institution will seek to serve the community with public broadcasting on channel 16. For another institution, such as a college or university, to seek channel 16 while WQED Pittsburgh holds the license would be to risk ostracism by the philanthropic community, which these other institutions also rely on for funding. As long as WQED Pittsburgh holds the license for channel 16, and WQED's management thinks they can successfully sell this asset, no other major institution will step forward and propose to assume the responsibility for a noncommercial channel 16." He thus asks that the license be revoked and award to another noncommercial entity. E-mail, Dec. 18, 2001.

¹⁹ The experience in other communities suggests that competing noncommercial applications would be filed. In a recent order adopting a point system for selecting among mutually exclusive applicants for NCE licenses, the Commission listed thirty-one television channels with mutually exclusive applications pending. Reexamination of the Comparative Standard for Noncommercial Educational Applicants, MM Docket No. 95-31, *Memorandum Opinion and Order*, 16 FCC Rcd 5074 App. D (2001). Some channels have as many as seven applicants, e.g., Channel *63, Tulsa, Oklahoma. *Id.* Channel *43 in Des Moines, Iowa, has six applicants. *Id.* Channel *56 in Memphis, Tennessee has five applicants, while channel *14, also in Memphis, has three applicants. *Id.* Because most of these markets with mutually exclusive noncommercial applications are smaller than Pittsburgh, it is reasonable to expect that multiple applications would be filed for a new noncommercial license there.

programs, and Pittsburgh Educational Television has already put together a proposal demonstrating that sufficient funding and programming could be obtained.²⁰

In sum, the public interest would be best served here by denying the license renewal for Channel *16 and allowing noncommercial, educational organizations that want to provide the Pittsburgh region with different noncommercial educational programming to compete for the license.

II. QED HAS NOT MET THE HIGH BURDEN OF PROOF NECESSARY TO DERESERVE CHANNEL *16.

A. The Commission's 1996 Decision Denying Dereservation of Channel *16 Controls the Instant Case.

As discussed above, the Commission previously refused to dereserve WQEX in order to accommodate QED's financial interests under more dire circumstances in 1996.²¹ Contrary to QED's claims, that "the 1996 decision is not relevant" to the instant case because "its holding was based on the existence of the Cornerstone Agreement,"²² that Agreement was not the controlling factor in the Commission's decision. The *1996 Order* emphasized the need to preserve the integrity of the noncommercial reservation scheme and a second public television channel for Pittsburgh. The Commission observed that "since reserving television channels for noncommercial operation in 1952, the Commission has never dereserved a noncommercial channel without substituting another reserved channel."²³ After reviewing the strong Commission precedent supporting this proposition, the Commission concluded:

In short, the Commission has repeatedly favored the long-term structural integrity of its noncommercial channel allotments scheme, including the maintenance of channel capacity as a means of facilitating future growth over the needs of particular licensees, both commercial and noncommercial. We recognized, of course, that special public

²⁰ Rob Owen, *Advocacy Group Unveils Plan to Operate WQEX*, Pittsburgh Post-Gazette, Nov. 7, 2001 (available at 2001 WL 28671365).

²¹ *1996 Order* para. 27.

²² *Petition* at 32.

²³ *1996 Order*, para. 18.

interest justifications could be presented that would support an exception to our strongly held policy disfavoring dereservation. Given the circumstances in this case, however, we cannot conclude that WQED has made the compelling showing we believe essential for us to do so.²⁴

The Commission also stated that “we cannot conclude that there is no need for a second noncommercial channel in Pittsburgh.”²⁵ The Order notes, in denying the dereservation, that WQEX’s original programming “cannot be fully replaced simply by extending the hours of operation of WQED.”²⁶ “Moreover, Pittsburgh currently has the benefit of two noncommercial educational stations during prime viewing hours, a benefit that would not be maintained by extending WQED’s broadcast day.”²⁷ While the Commission also cited the availability of an agreement between QED and Cornerstone as a “significant factor” in its decision,²⁸ the Cornerstone deal was not the controlling factor in the *1996 Order*. The Commission explained that it was “more compatible with the broad public interest if WQED were to pursue other options with respect to WQEX(TV), one of which *may be* to implement its agreement with Cornerstone.”²⁹ Indeed, the Commission “specifically [did] not prejudge or signal approval” of the proposal,³⁰ much less base its decision on that proposal.

B. Commission Precedent Strongly Supports Preserving the Future Availability of Noncommercial Educational Service on Channel *16.

In the *1996 Order*, the Commission reminded the parties that “the deletion of the reservation of an operating noncommercial educational television station so that it may be sold to a commercial operator . . . is not only unprecedented, but is also inconsistent with the Commission’s stated goal, over the past four decades, of promoting the growth of public television and the

²⁴ *Id.* para. 20.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *1996 Order* para. 20.

²⁹ *Id.* para. 23.

³⁰ *Id.*

broadcast of educational programming.”³¹ Thus, even if the *1996 Order* did not control the instant petition, the precedent upon which the Order was based still explicitly favors preserving a reserved channel in this case. In the *1996 Order*, the Commission relied on a long line of cases supporting the preservation of noncommercial channels over the short term interests of noncommercial and commercial licensees.³²

In the 1970s, the Commission issued several decisions that set an extremely high burden for dereservation, which do not support dereserving WQEX to accommodate QED’s financial interests.³³ For example, in *Ogden I*, the Board of Education of Ogden City (“Board”) held the license for KOET, a second reserved channel in Ogden, Utah. Financial constraints limited KOET’s hours of operation to those that corresponded with local schools’ operation.³⁴ In light of its financial problems, the Board proposed a partial dereservation of the channel in order to accept commercial broadcasting during part of the day.³⁵

The Commission denied the request, emphasizing the “very serious danger [of the] ultimate elimination of educational service on any such station and its replacement with merely additional commercial programming.”³⁶ It concluded that “that the potential for expanded educational service on [the reserved channel at issue] must be protected.”³⁷ Even though the Board’s plan would have retained KOET for educational programming and would actually have increased noncommercial service overall, the Commission nevertheless decided that the long-

³¹ *Id.* para. 16.

³² *1996 Order* paras. 18 - 20.

³³ See Amendment of Section 73.606, Table of Assignments, Television Broadcast Stations (Ogden, Utah), RM-1562, *Memorandum Opinion and Order*, 26 FCC 2d 142 (1970) (“*Ogden I*”), recon. denied, *Memorandum Opinion and Order*, 28 FCC 2d 705 (1971) (“*Ogden Recon*”); Amendment of Section 73.606, Table of Assignments, Television Broadcast Stations, (Ogden, Utah), Docket No. 21358, *Report and Order*, 45 RR 2d 768 (1979) (“*Ogden II*”).

³⁴ See *Ogden I*, para. 3 n.1.

³⁵ See *id.* para. 4.

³⁶ *Id.* para. 7.

³⁷ *Id.* para. 9.

term preservation of opportunities for noncommercial television outweighed the licensee's commercial and financial interests.

The Commission reaffirmed its strong policy disfavoring dereservation in its reconsideration of *Ogden I*, even though it meant that the station might go dark.

We realize that the Channel * 9 facility at Ogden as a reserved channel may go dark at this time due to the lack of local or state funds in the pertinent area of Utah. However, we would hope that the Ogden Board before going dark would seek the assistance of the Corporation for Public Broadcasting and its experts in fund raising planning. In any event the action we here take, i.e., the denial of the petition requesting de-reservation of Channel * 9 at Ogden, Utah, we believe after prolonged, conscientious, and concerned consideration will ultimately best carry out the purpose of our policy of reserving and continuing the reservation of key television channels in order for them ultimately to be used to bring the full spectrum of cultural and informational programming to the public.³⁸

Eight years after *Ogden I*, Golden Spike submitted a petition to dereserve Channel *9 (while preserving two hours daily for noncommercial programming), arguing the fact that Channel *9 had indeed gone dark and that no one had applied for Channel *9's license was evidence that noncommercial broadcasting was not feasible in the area.³⁹ Because other groups might eventually resume noncommercial service on Channel *9, the Commission denied the dereservation request.⁴⁰ The Commission found that dereservation "would permanently preclude Channel *9's noncommercial use."⁴¹

Similar concerns are present in the instant case. Because *Ogden I* established that the Commission places a higher priority on preserving potential noncommercial service over the financial needs of the licensee, the Commission should deny QED's attempt to dereserve and sell a public TV station to pay off its private debts and finance its other business operations.

³⁸ *Ogden Recon*, para. 7.

³⁹ *Ogden II* para. 1.

⁴⁰ *See id.* para. 20.

⁴¹ *Id.* para. 23.

Dereservation of Channel *16 would completely eliminate the potential for educational service on WQEX, as it had provided before QED began simulcasting.

The *Ogden Recon* and *Ogden II* decisions demonstrate that the Commission will allow a station to go dark rather than dereserve the channel. Here, QED is in no danger at all of actually going dark. Maintaining reserved status is also essential to preserving the *possibility* of future noncommercial service, which was paramount to the Commission in *Ogden II*. As elaborated in part VI, *infra*, if WQEX were open to competing applications, numerous local, noncommercial entities would likely step forward to operate WQEX to provide cultural and informational programming to the public. A local, noncommercial entity that wants to provide the citizens of Pittsburgh with an alternative source of community educational programming, now or in the future, would be permanently deprived of such an opportunity if the Commission dereserved Channel *16.

C. Dereservation of Channel *16 Would Set a Harmful Precedent for Communities Served by Two or More NCE Licensees by Encouraging Such Licensees to Auction off a Community Asset to Offset Financial Difficulties.

Currently, the Commission's strong precedent protects noncommercial channels from dereservation due to the financial distress of the licensee, as QED is claiming here. See 1996 Order, 11 FCC Rcd 11700. Permitting WQEX's dereservation would signal a change in policy that could decimate noncommercial broadcasting allotments. If the Commission permits noncommercial licenses to be dereserved on the basis of the financial needs of licensees, those licenses will become commodities like commercial licenses. Moreover, given the scarcity of new commercial television channels, noncommercial channels could command exorbitant prices, with proceeds going to private interests in lieu of returning to the public trust.⁴² Universities,

⁴² The Los Angeles-area noncommercial license KOCE was "valued at between \$26 million and \$39 million according to a recent appraisal commissioned by the community college district." Marc Ballon, *Now It's Cal Poly Pomona in Koce Bid; Television: College Joins USC and Chapman to Talk of Buying Public Station, but Coast Trustees Hope to Keep It*, L.A. Times,

municipalities and state governments that have other fiscal responsibilities besides operating a public television station may find themselves hard pressed to resist market rates for new commercial licenses. Also, other public TV duopolies facing similar financial difficulties as QED would likely follow suit with dereservation plans. Finally, licensees who know they have an “out” for financial difficulties, will not have any incentive to make wise business and programming decisions for the long-term vitality of noncommercial stations when they know they may simply dereserve upon showing financial distress. For all of these reasons, the Commission has placed a heavy burden on a party seeking to dereserve a reserved channel. WQED has not met this burden.

D. QED’s “Unique Set of Circumstances” Do Not Justify Dereservation.

QED contends that the “exceptional facts” surrounding its current situation present “compelling circumstances” to dereserve Channel *16.⁴³ QED’s “compelling circumstances” range from the supposed downturn of the Pittsburgh economy to the rise of the Internet. However, none of QED’s purported justifications, either individually or collectively, come close to the compelling showing that is necessary for the Commission to dereserve Channel *16.

Contrary to QED’s allegations, its alleged “unique set of circumstances” do not justify the dereservation of Channel *16.⁴⁴ QED’s financial problems were the result of questionable management decisions in the late 1980’s and early 1990’s to continue investing heavily in national program production when corporate funding and guaranteed outlets had been scaled back.⁴⁵ Now, QED is essentially seeking assistance of the FCC to provide a windfall of \$20

Aug. 19, 1999, at B1. In Albany, an agreement was made to sell WMHQ for \$23 million. *See* Jo-Ann Johnston, *WMHT Trustees Ponder Snag in Deal to Sell WMHQ*, Albany Times Union, Oct. 23, 1998, at E4.

⁴³ *Petition* at 9.

⁴⁴ *Petition* at 10.

⁴⁵ *See generally* *Petition to Deny* at 46-47; *see also* Bonnie Britt and Richard Gazarik, *Elsie to Board: ‘It’s my fault’*, Tribune Review, Nov. 7, 1994 (available at 1994 WL 3105501). The business judgement involved in these decision, as well as certain bookkeeping concerns, were addressed by a publicly announced internal investigation, but WQED CEO George Miles refused

million at the expense of the Pittsburgh public so that QED can better compete with other broadcasters (commercial and noncommercial) in developing new products for export. To illustrate, CEO Miles and board members contracted with Fox and Scripps-Howard to produce for-profit programs like Fox's *Clubhouse*, the House and Garden Channel's *Jane Nugent's Garden Party*, and *Lucille's Car Care Clinic*.

Instead of addressing its claimed financial problems by implementing sound financial controls, QED management eschewed business solutions by fashioning a political strategy: seek dereservation of WQEX, sell it to a commercial buyer, and use the proceeds to pay back QED's debt and subsidize its other business operations. At a June 30, 1995 joint meeting of WQED's finance and strategic planning committees, practical strategies (shutting down production, selling the magazine) for reducing the debt were dismissed. Instead, finance committee chair (and former Acting CEO) Don Korb proposed that the station "aim for a high level of profitability, even if it meant selling assets to do so." The plan to dereserve WQEX was then discussed.⁴⁶

While acknowledging likely "objections" from "the constituents of WQEX," WQED management was determined to regain their past glory as a national producer. In its 1996 filing with the FCC, WQED spelled out its plan: "The primary business that gives [WQED] its identity and purpose [is] the production of high-quality local and national broadcast and non-broadcast products and the distribution of these products to regional, national and international markets." The larger question this raises is the propriety of soliciting the FCC to provide a windfall of \$20

to release the report even to his own board of directors. See Sally Kalson, *QED Gets New Name, Chairman, Plus Focus for Future*, Pittsburgh Post-Gazette, June 23, 1995 (available at 1995 WL 3389646).

⁴⁶ *Id.* It must be noted in this context that WQEX had never been a financial drain on QED's resources. Quite the contrary, its cost of operation averaged only about \$1 million a year, a fraction of QED's total budget and its dedicated revenues from all sources actually exceeded its costs. WQEX was very popular with Pittsburgh viewers, ranking as the third most watched second station in the country. *Id.*

million at the expense of the Pittsburgh public so that QED can better compete with other broadcasters (commercial and noncommercial) in developing new products for export.

To bypass normal dereservation procedures, QED lobbied for and obtained a rider attached to a 1996 appropriations bill directing the Commission to act on a petition for dereservation filed by QED within 30 days of its receipt.⁴⁸ In spite of the abbreviated comment period, QED's subsequent petition generated strong public opposition.⁴⁹ The Commission denied the petition, concluding that dereservation of Channel *16 was not in the public interest because, *inter alia*, there still existed a need for a second noncommercial channel in Pittsburgh, and that dereservation was unnecessary to relieve WQED of its financial distress.⁵⁰ (As discussed *supra* Part II, the Commission's conclusions are even more apropos now than they were in 1996.)

QED then turned to its backup plan - a complicated three way deal between QED, Cornerstone, and Paxson. The Pittsburgh community expressed its opposition to this deal with 5,000 letters and petition signers locally and 35,000 letters and phone calls nationally, in addition to numerous letters to the editor, public protests and talk radio statements. The Mass Media Bureau raised substantial questions about whether the proposed exchange complied with FCC rules.⁵¹ Despite invitations by the FCC, the applicants were reluctant to cooperate in fine-tuning the application, resulting in delays in considering the application. The FCC eventually approved

⁴⁸ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1349 (1996). This rider was not the result of measured deliberation. The provision was not part of the initial House or Senate Appropriations Bills. WQED managed to have the rider inserted at the very last minute without any hearing or debates.

⁴⁹ QED's petition engendered widespread local public opposition to the dereservation. The Alliance for Progressive Action and the QED Accountability Project; Association of Local Television Stations, Inc.; Choice Olean T.V. Station, Inc.; the Pittsburgh Educational Television, Inc.; Standfast Broadcasting Corp.; Unicorn Communications; WBPA-LP, Channel 29 Pittsburgh; and numerous individual Pittsburgh citizens all submitted comments opposing the dereservation. 1996 Order para. 2.

⁵⁰ *Id.* para. 4.

⁵¹ See Letter from Barbara A. Kreisman, Chief, Video Services Division to Olean Eagle, President, Cornerstone Television, Inc. (Mar. 27, 1998).

the transaction in December 1999.⁵² Fortunately for the viewing public, Cornerstone eventually withdrew from the deal and the assignments never occurred. However, one year after this plan fell through, QED tried yet again to dereserve WQEX so that QED could turn a profit.

QED now has the audacity to claim that its repeated failures to deprive the Pittsburgh community of its second public TV channel somehow comprise “unique circumstances” that justify the instant petition.⁵³ If anything, QED’s “unique circumstances” demonstrate its estrangement from, and disregard of, the community it is licensed to serve. First, QED went to Congress in an attempt to foreclose public participation in the dereservation process. Second, even after the Commission determined that dereservation was not in the public interest, QED devised a three way deal to assign WQEX to another broadcaster in exchange for millions of dollars. Finally, despite its repeated failures to deprive Pittsburgh of an alternative voice in public broadcasting, QED has come forth once again with another plan to dereserve WQEX. In doing so, QED continued its attempt to foreclose public participation by trying to sweep the instant petition under the 1996 rider.⁵⁴ QED also failed to disclose its plans or elicit community reaction as it negotiated its current deal with Shooting Star.⁵⁵

Consequently, it is the citizens of Pittsburgh, not QED, that have faced “protracted delay”⁵⁶ in waiting for QED to properly serve its community. QED’s questionable financial practices in the early 1990’s, and its relentless attempts to use Congress and the Commission to deprive Pittsburgh of its second noncommercial educational channel, only serve to demonstrate QED’s intent to serve its own self-interest to the detriment of the public. The Commission

⁵² *Id.* para. 63.

⁵³ *Petition* at 10-11.

⁵⁴ *Petition* at 6-7.

⁵⁵ Barbara Vancheri, *2 Groups Ask FCC to Block WQEX Sale*, Pittsburgh Post-Gazette, Jan. 19, 2001 (available at 2001 WL 3358263); Jerry Starr, *Midweek Perspectives: WQED vs. The Public Interest*, Pittsburgh Post-Gazette (Feb. 7, 2001)(last visited Dec. 18, 2001)<<http://www.post-gazette.com/forum/20010207edjerrystarr5.asp>>.

⁵⁶ *See Petition* at 10-11. (QED complaining of “protracted delay” in issuing Assignment Order)

should ignore QED's complaints of self-inflicted delays and instead act promptly to place Channel *16 into the hands of a qualified NCE willing to offer distinct programming services.

E. QED's Financial Problems Are an Inadequate Basis for Dereservation.

Along with its alleged "unique circumstances," QED relies on the "magnitude of its financial distress" to justify the instant petition.⁵⁷ QED's fundamental argument for dereservation is that the sale of WQEX is necessary to pay off QED's debt and permit it to finance quality programming on WQED.⁵⁸ As demonstrated below, this flawed argument does not justify dereservation.

1. QED's Alleged Financial Distress is Even Less Compelling Than When the Commission Refused to Dereserve WQEX in 1996.

In 1996, QED claimed a debt of \$14.5 million.⁵⁹ Even at that time, QED admitted it was in no danger of going dark.⁶⁰ The Commission found that QED's financial distress did not present the "clear and present 'threat to the public of losing or impairing local public broadcasting service' that would warrant the dereservation" of WQEX.⁶¹

QED's claim of financial distress is even less compelling now than it was in 1996. As of June 30, 2000 QED's debt stood at \$9.32 million - some \$5.18 million less than five years ago despite the current recession.⁶² If a \$14.5 million debt is insufficient to prompt dereservation, then *a fortiori* a \$9.32 million debt is as well.

Even that figure may be incorrect. At its September 21, 2000 board meeting, barely four months before filing, WQED finance chair Jack Isherwood called 2000 WQED's "best operating

⁵⁷ *Petition* at 13.

⁵⁸ *Petition* at 14, 18-21.

⁵⁹ *1996 Order* para. 8.

⁶⁰ *Id.* para. 20.

⁶¹ *Id.*

⁶² See *Petition* at 13.

performance in over ten years.”⁶³ At that time, the station announced a debt of only \$7 million -- significantly lower than the \$9.2 million presented just four months later.

2. The Terms and Conditions of QED’S Debt Suggest That its Claims of Fiscal Distress Are Not as Severe as QED Presents Them.

Moreover, QED’s debt of \$9.32 million may not be as severe as it claims. As of June 2000, QED claimed it had \$1.65 million in bank debt and \$3.17 million in overdue accounts payable, as well as \$4.5 million owed to the Program Development Seed Fund, a part of the Capital Campaign fund.⁶⁴ QED contends that the money taken from the Program Seed Fund “must” be paid back.⁶⁵ This portion of the debt, \$4.5 million, is almost half of what QED claims it owes.

However, the Notes to QED’s June 30, 1999 and 1998 Financial Statements and Schedule undermine this claim by indicating that repayment of these amounts is discretionary.⁶⁶ “The Company *intends* to repay these funds; however that repayment is ultimately dependent upon the successful implementation of management’s plans to improve the Company’s operations”(emphasis added).⁶⁷ Further, QED appears to only be borrowing the money from its own Capital Campaign Fund, and it has failed to document when or why the terms of the donations to the Seed Fund require repayment. In other words, QED’s “financial distress” is based in large part on a debt it owes to itself.

3. QED Mischaracterizes its Revenue and Funding Problems and the Burden of its DTV Transition.

Not only has QED overstated its debt burden, but it has also inflated the amount it needs for future upgrades and failed to reveal other sources of available funds. First, WQED fails to

⁶³ Rob Owen, *WQED Has New Budget, Old Problem*, Pittsburgh Post-Gazette, Sept. 20, 2000 (available at 2000 WL 22090209).

⁶⁴ See *Petition* at 12; See also *Petition* Exhibit B, “WQED Pittsburgh Financial Statements and Schedule, June 30, 1999 and 1998, Notes to Financial Statements” at 12 (“*Exhibit B*”).

⁶⁵ *Petition* at 12.

⁶⁶ Exhibit B.

⁶⁷ *Id.* at 14.

acknowledge the financial support from state, federal and private sources it has received and can expect to receive for the costs of the digital transition. The Pennsylvania Public Television Network already has granted WQED \$1.5 million to erect a digital transmitter. WQED also has enjoyed a share of the \$56 million provided to all stations by the federal government.⁶⁸ Since very few stations have a second station to cash in, the federal government has indicated that it will provide much more support and PBS has a plan to raise \$1 billion for all stations.

4. Several Alternatives to Dereservation Are Available to Address QED's Financial Problems.

QED does not need to take the drastic step of selling off WQEX to remain financially viable. Commission precedent dictates that QED must exhaust other alternatives before turning to dereservation as a remedy for financial distress,⁶⁹ and QED *does* have alternatives that it has not explored. For example, QED has owned and operated *Pittsburgh Magazine* for many years. According to QED's own figures, *Pittsburgh Magazine* has been consistently profitable for at least five years and could be sold as a separate business.⁷⁰

⁶⁸ Dan Odenwald, *Stations to Digital TV Date: Drop Dead!*, Current, Nov. 5, 2001 at 1, 20.

⁶⁹ See 1996 Order para. 22; *Ogden I* (concluding that station in danger of going dark for financial reasons must pursue alternate funding before the Commission would consider dereservation).

⁷⁰ This chart incorporates figures extracted from *Exhibit B*:

Analysis of Magazine Profitability

	1996	1997	1998	1999	2000
Magazine Revenue	\$3,084,429	\$3,098,236	\$3,155,522	\$3,609,542	\$3,836,628
Magazine Expense	\$2,843,555	\$2,566,654	\$2,686,348	\$3,195,952	\$3,004,514
Magazine Profit (Loss)	\$240,874	\$531,582	\$469,174	\$413,950	\$832,114

WQED considered an offer to sell *Pittsburgh Magazine* to an interested party five years ago. The offer included continued program listings in the magazine. At the time, board chair James Roddey estimated that *Pittsburgh Magazine* could be valued as high as \$5 million. See Bill Steigerwald, *Will a Strapped WQED Sell Off Pittsburgh Magazine?*, Pittsburgh Post-Gazette, Nov. 23, 1995 (available at 1995 WL 9545239).

Also, in spite of QED's claims that it has substantially cut its staff,⁷¹ it still has not addressed its abnormally high executive salaries. In 1998, the top nine QED executives were paid an average of \$149,821 in total compensation for managing an NCE in Pittsburgh (20th ranked DMA).⁷² This is more than 25 percent greater than the \$117,706 average compensation paid to executives of WHYI in Philadelphia, a much larger city (4th ranked DMA).⁷³ QED's average compensation is also more than 70 percent greater than the \$87,566 average compensation paid to executives of KETC in St. Louis, a comparably sized city (22nd ranked DMA).⁷⁴ If QED reduced just these nine executives' payroll to an amount comparable to the St. Louis market, QED would save \$1.3 million a year.

KQED in San Francisco is illustrative. In 1996, due primarily to a bad building investment, KQED San Francisco faced a long-term debt of greater than \$13 million and a short-term debt of almost \$5 million.⁷⁵ In the spring of that year, it sold its *San Francisco Focus* magazine for about \$3.1 million and its KQED Books and Tapes division for \$1.2 million, wiping out its short-term debt and restoring its credit.⁷⁶ Then, KQED sold \$13.4 million in twenty-five-year tax-exempt bonds issued by the California Economic Development Financing Authority. The bonds are guaranteed by the Wells Fargo Bank, the Lucille Packard Foundation, and the Bernard Osher family. WQED has had a long association with the Mellon bank, the Heinz Family Foundation, and the Henry Hillman family. It also has thousands of citizens who buy bonds and watch public TV.⁷⁷ WQED could partner with broad segments of the community to build a healthier station. Instead, it chooses to alienate thousands while questing after an

⁷¹ *Petition* at 18.

⁷² Barbara Vancheri, *Citizen Group Attacks WQED Over Salaries*, Pittsburgh Post-Gazette, (Feb. 22, 2001)(last visited Dec. 18, 2001)<<http://www.post-gazette.com/tv/20010222wqed4.asp>> (“Vancheri”).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Vancheri.

⁷⁷ *Id.*

undeserved windfall. Thus, even assuming QED were in as dire financial straits as it claims to be, it could sell *Pittsburgh Magazine*, reduce salaries and address its “creative” accounting practices to regain its footing, all without dereserving Channel *16.

III. THE PITTSBURGH AREA ECONOMY IS FULLY CAPABLE OF SUPPORTING TWO DONOR RELIANT NONCOMMERCIAL STATIONS.

The Commission has requested comment on the Pittsburgh region’s ability to continue to economically support two donor-reliant noncommercial educational television stations in response to QED’s statements regarding population and corporate headquarter decreases in the area. To address the Commission’s inquiry, CIPB/APA obtained an economic assessment of the Pittsburgh region and QED’s claims from Paul R. Flora, an experienced economic analyst and professor who has also been a regional economist for the Pittsburgh area.⁷⁸

Contrary to QED’s claims, Flora concluded that the Pittsburgh economy is healthier than ever and, thus, able to continue to support two noncommercial educational stations as it has done for the past forty years. QED’s claims of Pittsburgh’s economic decline are greatly exaggerated and misleading. None of the key economic measures indicate that the Pittsburgh economy is worse now than 20 years ago. While the population and number of corporate headquarters in Pittsburgh have declined, total personal income and corporate revenues in the area have increased, providing even greater financial resources for funding donor-dependant stations. Moreover, the lack of any other offers to purchase WQEX results from QED’s own actions, not from outside economic influences. Finally, regardless of economic growth, communities *smaller* and with less income and revenue resources than Pittsburgh have supported and continue to support two donor-dependent noncommercial stations.

A. QED Paints an Unduly Pessimistic Picture of the Pittsburgh Economy, Which is Actually Healthier Than it Has Been in the Past 50 Years.

Pittsburgh's economy has rebounded from past recessions and is now healthier than ever. QED's cursory conclusions misrepresent the state of Pittsburgh's economy by measuring economic health in comparison to the nation as a whole. Pittsburgh's economy has evolved and grown regardless of the pace of growth for the remainder of the nation. According to Flora, "[p]opulation loss does not equate with economic decline; regions experience economic growth when unemployment rates fall and per capita incomes rise."⁷⁹ Setting aside the cyclical effects of the recession of the early 1990s and the current recession, Pittsburgh's economy is not in decline, as QED would have the Commission believe.⁸⁰

Employment growth and per capita income, primary measures of economic growth, have been steadily increasing in Pittsburgh. By 1990, Pittsburgh's employment had returned to its 1979 level of 913,200 jobs, and in 2000, Pittsburgh had 1.126 million jobs.⁸¹ By 1998, Pittsburgh's per capita income had risen to \$28,149, which is over \$6,600 more (in inflation-adjusted dollars) than the last peak in 1979.⁸² Although Pittsburgh's population has declined somewhat, the Pittsburgh region has a higher level of total personal income than ever before, gaining more than \$10 billion between 1979 and 1998 (adjusted for inflation).⁸³ Other notable sources agree with Flora's assessment. For instance, the region's available after-tax disposable income, which could be used for supporting broadcast stations, has also grown at a compounded

⁷⁸ See Paul R. Flora, A Historical Review of Pittsburgh's Economic Climate in which QED Operates (2001); Paul R. Flora Resume (Both attached as Exhibit A)(*"Flora"*).

⁷⁹ *Flora* at 14.

⁸⁰ *Id.*

⁸¹ *Id.* at 11-12.

⁸² *Id.* at 12.

⁸³ *Flora* at 8, 12.

average annual rate of 2%, an increase of \$4,852,000, since 1995.⁸⁴ Additionally, the collective profits of the Fortune 500 companies in Pittsburgh today are more than *\$1.2 billion higher than in 1960* (after adjusting for inflation).⁸⁵ To the extent that QED relies on large corporate donations, more funds are available today than in the past

While the number of Fortune 500 firms headquartered in Pittsburgh has shrunk since 1960, Pittsburgh recently ranked *ninth* in the top Fortune 500 cities with corporate headquarters.⁸⁶ Major corporations, including USX, Alcoa, Heinz and PPG, are headquartered in Pittsburgh.⁸⁷ It is also noteworthy that “Carnegie Mellon graduates have started up many thriving high-tech companies in the Pittsburgh area, new business are being lured to the city, while mainstays like Alcoa are expanding.”⁸⁸ In fact, despite claims to the FCC and the Pittsburgh media that its debts made it impossible for the station to raise underwriting for new productions, WQED proceeded to raise \$4.5 million from local sources for just one local newsmagazine show.⁸⁹

Moreover, WQED has not shown that it has used its best efforts to get further funding from these corporations. Being located in one of the top 9 corporate headquarter markets, QED presumptively has more access to resources than most of the other stations in the numerous communities with more than one public television station.

⁸⁴ Investing in Television Market Report 2001, BIA Financial Network, 3rd Ed.

⁸⁵ *Flora* at 12.

⁸⁶ *Fortune 5 Hundred Ranked Within States*, Fortune Magazine, Vol. 143, No. 8, (Apr. 16, 2001).

⁸⁷ *Id.*; City of Pittsburgh Website (visited Dec. 17, 2001)

<www.city.pittsburgh.pa.us/ed/business_climate.html>.

⁸⁸ Eileen Davis Hudson, *Pittsburgh (economy and various statistics of city's industries)*, MediaWeek, Vol. 11, Issue 7, Feb. 12, 2001.

⁸⁹ Rob Owen, *WQED to Debut Nightly Newsmagazine*, Pittsburgh Post-Gazette, Nov. 19, 1999 (available at 1999 WL 25698755).

Finally, QED's claim that it has not received any "bona fide offers" to purchase WQEX is not an indication of poor economic health.⁹⁰ The lack of bona fide offers is more likely due to the fact that from May 1996 until January 2000, and from September 2000 until the present, QED has been contractually barred from even discussing proposals from other parties.⁹¹ Furthermore, while QED has acknowledged that "there's a number of people interested in acquiring the title to WQEX,"⁹² non-profit entities may well have been dissuaded from attempting to acquire the station by George Miles' statement, reported in the Pittsburgh Post-Gazette after the first Petition to Dereserve was denied, that QED "will not give [WQEX] up to another nonprofit."⁹³ Additionally, the amount of money QED is demanding for WQEX is likely more than bona fide noncommercial applicants can afford and is a further indication of QED's attempt to both land a windfall and avoid competition.

In sum, the problem is not the lack of offers to assume responsibility for using the channel to serve the public. Neither is the problem the unwillingness of community groups to make reasonable offer for the noncommercial license. The problem is that WQED insists on exploiting WQEX to reap a windfall of \$20 million, even though it will mean the end of public service broadcasting on Channel *16.

⁹⁰ See *Petition* at 19.

⁹¹ In the May 1996 Asset Exchange Agreement with Cornerstone, QED agreed to not "solicit, initiate, or encourage...or participate in any discussions or negotiations regarding any proposals relating to any acquisition or purchase of all or any substantial amount of QEX Assets." Cornerstone and WQED Asset Exchange Agreement, Art. 9, § 4. (May 23, 1996). And, in the September 2000 Asset Purchase Agreement with Shooting Star, QED agreed that it would not solicit or encourage proposals relating to any substantial portion of QEX or participate in any negotiations to do so. Shooting Star and WQED Asset Purchase Agreement, Art. 8, § 2. (Sept. 26, 2000). Both of these agreements prohibited any discussion with potentially interested parties.

⁹² Rob Owen, *Third Try to Sell WQEX May be Charm*, Pittsburgh Post-Gazette, May 5, 2000 (available at 2000 WL 10901773).

B. Numerous Markets of Comparable Size to Pittsburgh, and Even Markets Smaller Than Pittsburgh, Currently Sustain More Than One Public TV Station.

QED's arguments regarding market rank and other station offers are likewise misleading and immaterial to the community's ability to support two noncommercial stations. Based on Flora's assessment, regardless of the DMA rank or population contraction, the Pittsburgh region has more personal and corporate funds available for support than ever before. Also, Pittsburgh's rank as the 20th DMA today still puts it in the top 10% of the 210 ranked markets.⁹⁴ Moreover, rankings can be misleading. For instance, a fourth-place team in a five-team division may appear to be a poor performer, but that team may only be one game out of first in a division with four equally good teams. Thus, the Commission should remain mindful of the entire marketplace when evaluating QED's claims.

QED's reasoning about market rank is likewise unpersuasive as numerous markets comparable to or smaller than Pittsburgh sustain more than one noncommercial television station. At least 61 of approximately 210 ranked markets have two or more noncommercial stations, and 49 of those are in markets with lower DMA ranks than Pittsburgh.⁹⁵ Moreover, approximately 12 of those markets support noncommercial duopolies.⁹⁶ Certainly if so many markets, some as small as Twin Falls, Idaho (ranked 188th), can sustain two noncommercial stations, the 20th ranked Pittsburgh region should be able to do the same. Also, many markets smaller than Pittsburgh's have second stations that provide quality alternative public

⁹³ Sally Kalson, *WQED's Miles Says Station Won't Give Away WQEX*, Pittsburgh Post-Gazette, July 10, 1996 (available at 1996 WL 7667022).

⁹⁴ Investing in Television Market Report 2001, BIA Financial Network, 3rd Ed. ("*BIA*").

⁹⁵ 47 C.F.R. § 73.606; *BIA* at 5-4.

⁹⁶ See *BIA*, at various individual city DMA pages.

broadcasting. For example, the second local public TV station in Milwaukee, Wisconsin (ranked 33rd), has developed its own niche in quality, educational programming.

Just as numerous other regions, most ranked lower than Pittsburgh, continue to support two noncommercial stations, Pittsburgh can do the same. “[T]he Pittsburgh economy is far healthier, more robust and wields more resources now than during the past 50 years.”⁹⁷ For purposes of supporting two noncommercial stations, then, the Pittsburgh economy is better equipped now than at any time during the past forty years, when its economy managed to support two such stations, and the Commission should not dereserve WQEX.

IV. MORE THAN EVER, THE PITTSBURGH AREA STILL NEEDS TWO NONCOMMERCIAL EDUCATIONAL STATIONS.

The Commission has requested comment on the Pittsburgh region’s continuing need for two noncommercial educational television stations. Public television is the only universally available medium of news and information that provides free, local, noncommercial educational programming. Contrary to QED’s assertions,⁹⁸ new media do not obviate the need for public television, nor can these emerging technologies substitute for public television stations such as WQEX.

First, newer technologies are not universally available. Only broadcast television has near universal availability. Cable television has only an 82% penetration in the Pittsburgh DMA.⁹⁹ The Internet is not universally accessible. Only about 40% of homes in Pennsylvania have Internet access, and only a small percentage of these homes have broadband access.¹⁰⁰

⁹⁷ *Flora* at 14.

⁹⁸ *Petition* at 27.

⁹⁹ Eileen Davis Hudson, Pittsburgh, Mediaweek, Feb. 12, 2001. DBS penetration is substantially lower. Nationwide, it has only about 13 million subscribers. *Seventh Annual Report* para. 61.

¹⁰⁰ See NTIA, *Percent of U.S. Households with High-Speed Internet Access, 2000*, (last visited Dec. 18, 2001) <www.ntia.doc.gov/ntiahome/fttn00/charts00.html#a101>. Only 4% of all households nationwide have the high speed broadband access necessary to receive television quality Internet video.